SINOHYDRO CORPORATION (M) SDN BHD
v. KAJ DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
SUPANG LIAN JCA
SEE MEE CHUN JCA
[CIVIL APPEAL W-03(IM)-17-03-2023]
19 JUNE 2023

Abstract – *The seizure of land to enforce the judgment for the payment of money can be through a writ of seizure and sale where the procedure is provided in O. 47 r. 6 of the Rules of Court 2012 and para. (c), in particular, spells out what the ex parte application ought to disclose.*

CIVIL PROCEDURE: *Judgments and orders – Prohibitory order – Ex parte notice of application – Secured creditor obtained ex parte prohibitory order in respect of parcels of land and served same on judgment debtor – Whether there were material non-disclosures – Whether warranted immediate discharge of prohibitory order – Rules of Court 2012, O. 45 & O. 47 r. 6(c)*

The respondent, the master planner and developer of the Melaka Gateway Project ('project'), had awarded the appellant the contract to carry out the works for the said project. The works comprised reclamation and related works to construct three islands in relation to section PME1, PME2 and PP. It was agreed that the respondent would create and perfect legal land charges over nine parcels of land in PME1 in favour of the appellant as security for payment for Stage 1 (secured land), failing which the appellant had the option to suspend the works or terminate the contract. As the land charges were not created and perfected and, coupled with what the appellant said was the respondent's failure to pay, it proceeded to suspend the works. The appellant commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') against the respondent. It was determined that the respondent shall pay the appellant the amount of RM205,805,673.05 ('adjudicated sum'). The appellant later obtained an *ex parte* prohibitory order ('PO') at the High Court, in respect of 13 parcels of land (not the secured land of the nine parcels of land), and served the same on the respondent. The respondent applied to set aside the PO but the same was dismissed by the Deputy Registrar. However, the respondent was successful in its appeal to the judge-in-chambers; the PO was set aside on the grounds that there had been material non-disclosures by the appellant when it applied *ex parte* for the writ of seizure and sale ('WSS') and the PO, which warranted an immediate discharge of the PO. Hence, the present appeal.

Held (allowing appeal; setting aside order of High Court)
Per See Mee Chun JCA delivering the judgment of the court:

(1) What had been disclosed in para. 11(c) of the affidavit in support of the *ex parte* notice of application was exactly what O. 47 r. 6(c) of the Rules of Court 2012 ('ROC') required, nothing more and nothing else. Order 45 of the ROC provides the scheme towards the enforcement of any judgment or order for the payment of money, where one of the modes for enforcement was by way of WSS. Order 47 of the ROC deals specifically with WSS and the procedure for seizure of immovable property is spelt out in r. 6. Therefore, the seizure of land to enforce the judgment for the payment of money could be through a WSS. What was said to be material non-disclosures went beyond what was required by O. 47 r. 6(c) of the ROC. They were not non-disclosures, let alone material. The appellant had indeed complied with O. 47 r. 6(c) and disclosed all that was required. (paras 35, 36, 39 & 42)

(2) The adjudicated sum had been obtained by the appellant through the adjudication decision where the High Court had allowed its enforcement pursuant to s. 28 of the CIPAA. This meant that the adjudication decision could be enforced as if it was a judgment of the court. It was not disputed that this money had yet to be paid even as of today. The appellant was, therefore, entitled to enforce the valid adjudication decision where the execution proceedings such as the PO was specifically provided in O. 47, particularly r. 6 and, in the context of this appeal, more particularly paras. (a) to (c). (para 40)

(3) There was no authority to the effect that a secured creditor could not proceed with execution proceedings to recover a judgment debt or that the appellant's remedies were limited to realising the security it held. In fact, O. 45 r. 1 of the ROC did not make a distinction as to the type of creditor where modes of enforcement were concerned. The appellant was entitled to enforce its judgment as long as it was in accordance with the mode and procedure in O. 45 and, specifically, in O. 47 r. 6 of the ROC. (paras 59 & 60)

Case(s) referred to:

AIC Ltd v. Federal Airports Authority Of Nigeria [2022] 1 WLR 3223 ***(refd)***
Aristocrat Technologies Australia Pty Ltd and Others v Allam and Others [2016] 327 ALR 595 ***(refd)***
Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors [1991] 1 CLJ 711; [1991] 2 CLJ (Rep) 332 HC ***(refd)***
Econpile (M) Sdn Bhd v. ASM Development (KL) Sdn Bhd [2021] 9 CLJ 896 HC ***(refd)***
Indacon Sdn Bhd v. DMC Development Sdn Bhd [2019] 1 LNS 1369 HC ***(refd)***
International Finance Trust Co Ltd And Another v. New South Wales Crime Commission (IFTC) [2009] 261 ALR 220 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
The Customs And Tax Administration Of The Kingdom Of Denmark v. Saling Capital Ltd & Ors And Other Appeals [2021] 7 CLJ 857 CA ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, s. 28
Rules of Court 2012, O. 2 r. 2, O. 45 rr. 1, 12, O. 47 r. 6(a), (b), (c)

Uniform Civil Procedure Rules 2005 [Aus], r. 39.3(c)

For the appellant - Alex De Silva, Teo Lee Hoon & Tan Chee Ying; M/s Tan Chuan Yong & SM Chan
For the respondent - Loh Siew Cheang, Carine Cheong Kay Wei & Claudia Nyon Syn Yue; M/s Cheang & Ariff

[Editor's note: For the High Court judgment, please see Sinohydro Corporation (M) Sdn Bhd v. KAJ Development Sdn Bhd [2023] 4 CLJ 599 (overruled).]

Reported by Najib Tamby

JUDGMENT

See Mee Chun JCA:

Introduction

[1] This is an appeal by the appellant (Sinohydro) against the decision of the High Court dated 10 March 2023 to set aside an *ex parte* prohibitory order (PO) granted. The PO is in respect of 13 parcels of land (subject land).

[2] The PO was obtained on 11 November 2022 and the sealed order was extracted on 21 November 2022. It was presented for registration on 23 November 2022 at the relevant land office.

[3] On 30 November 2022, the PO was served on the respondent (KAJ).

[4] On 6 December 2022, KAJ applied to set aside the PO, which was dismissed by the Deputy Registrar (DR) on 21 January 2023. On 10 March 2023, KAJ's appeal to the judge in chambers was allowed.

[5] The appeal by Sinohydro was allowed by this court and we now give our reasons.

Parties

[6] Sinohydro is the contractor for works under the Melaka Gateway Project (project). KAJ is the master planner and developer of the project.

The Works

[7] By letter of award dated 6 June 2017 (LOA), KAJ awarded to Sinohydro the contract known as "design and build contract for the reclamation and related works for (part of) 609 acres of land at the Melaka Gateway Project, Melaka" (the works). The works comprised reclamation and related works to construct three islands in relation to section PME1, PME2 and PP.

[8] By an amendment letter dated 8 February 2018 and security agreement also dated 8 February 2018, it was agreed that KAJ would create and perfect legal land charges over nine parcels of land in PME1 in favour of Sinohydro as security for payment for Stage 1 (secured land). These were to be done by 8 October 2018, failing which Sinohydro had the option to suspend the works or terminate the contract.

[9] The land charges were not created and perfected and coupled with what Sinohydro said was KAJ's failure to pay, it suspended the works in October 2018.

[10] In March 2019, KAJ terminated the contract.

2019 Originating Summons (OS)

[11] In June 2019, KAJ filed its 2019 OS against Sinohydro and Companies Commission Malaysia for a declaration that the statement of particulars (Form 34) dated 8 February 2018 was misleading, incorrect and/or erroneous. Sinohydro filed a counterclaim that it had a valid equitable charge over the nine parcels of land and for a rectification of the statement. On 4 December 2020, KAJ's claim was dismissed and Sinohydro's counterclaim was allowed.

Proceedings Under Construction Industry Payment And Adjudication Act 2012 (CIPAA)

[12] On 16 August 2019, Sinohydro commenced adjudication proceedings under CIPAA against KAJ premised on certified and uncertified payments. By adjudication decision dated 21 October 2020 and amended 4 November 2020 (adjudication decision), it was determined that KAJ shall pay Sinohydro the amount of RM205,805,673.05, interest and costs (adjudicated sum).

[13] KAJ filed its applications to set aside and stay the adjudication decision while Sinohydro filed an application to enforce. On 16 April 2021, the setting aside and stay were dismissed and the enforcement was allowed.

Winding-Up Against KAJ

[14] On 24 February 2022, Sinohydro filed a wound-up petition against KAJ on grounds of actual insolvency based on the adjudicated sum pursuant to the enforcement order. KAJ filed its application to strike out, on various grounds including that the petition was based on a disputed debt. On 27 June 2022, the petition was struck out.

[15] KAJ was previously wound up on 28 July 2020 upon the application by one Mei He Development Sdn Bhd. The wound-up was terminated on 24 January 2022.

Arbitration Proceedings

[16] There are pending arbitration proceedings where the sum being claimed by Sinohyrdo is for about RM348 million (which includes the adjudicated sum). There is a counterclaim by KAJ for the sum of about RM739 million.

Above Events Undisputed

[17] The events as set out above are not disputed and it forms the backdrop to the application for the *ex parte* PO and ultimately the decision of the High Court to set aside the PO.

Decision Of The High Court (HC)

[18] The grounds of judgment of the HC (GOJ) can be found in encl. 19/16-72.

[19] The HC referred to a decision of this court in *The Customs And Tax Administration Of The Kingdom Of Denmark v. Saling Capital Ltd & Ors And Other Appeals* [2021] 7 CLJ 857; [2022] 1 MLJ 316 for the principles to consider in whether there has been relevant non-disclosure and the consequence for the failure to disclose. In the event of material non-disclosure, an *ex parte* order may be discharged.

[20] The HC found that there had been material non-disclosures by Sinohydro when it applied *ex parte* for the writ of seizure and sale and the PO, which warranted an immediate discharge of the PO.

[21] In para. 69 of the GOJ, it was said that it is immediately apparent that Sinohydro did not disclose the following material facts. These material facts are set out as follows:

(a) Sinohydro is a secured creditor of KAJ whereby under the Security Agreement, charges were created in Sinohydro's favour over the Secured Lands as security for the payment of sums payable by KAJ in respect of the Project of up to RM724,586,444.00. It was agreed that the total value of security to be provided by KAJ shall not be less than RM978,191,699.27;

(b) the titles of the Secured Lands are in Sinohydro's possession and Sinohydro has lodged private caveats over the same. The High Court has declared that Sinohydro has an equitable charge over the 9 Plots of Land;

(c) the Subject Lands are distinct from the 9 Plots of Land as the former are not appropriated to Sinohydro as security and are available to unsecured creditors of KAJ involved in the Project;

(d) Sinohydro and KAJ have a dispute that is before the Arbitral Tribunal involving Sinohydro's claim for RM348,268,544.59 and KAJ's counterclaim for RM739,200,221.69. The Adjudication Sum is part of the sums being claimed by Sinohydro in the arbitration;

(e) Sinohydro's petition to wind up KAJ premised on the Adjudication Sum was struck out by the Court on the ground, *inter alia*, that the said Sum is a disputed debt and Sinohydro did not appeal against the decision. In Sinohydro's AIR in the wound-up proceedings, it claimed that the value of the 9 Plots of Land is not enough to satisfy its arbitral claim of RM348,268,544.59. Based on this asserted fact, Sinohydro seized the Subject Lands which it claims has a value of RM240,672,276.00 according to the report by KPH Property Consultants Sdn Bhd ('KPH');

(f) the value of the Subject Lands in the report by the Liquidator for purposes of the wound-up proceedings i.e. RM915,382,382.00, is different from the value according to KPH's Valuation Certificate as exhibited in Sinohydro's AIS in respect of the application for the *Ex-Parte* Order; and

(g) the Project is an ongoing national project and is part of the Economic Transformation Programme of the nation. In March 2022, KAJ, the State Government of Melaka and the Malaysian Investment Development Authority had promoted the Project at the Dubai Expo 2020 to attract foreign direct investments. This is material to the issue of the probable effects of the *Ex Parte* Order on KAJ and the Project.

Submissions Of Sinohydro

[22] Sinohydro essentially contended there was a distinction between *ex parte* applications for discretionary remedies such as injunctions and that of *ex parte* applications for the issuance of execution orders. When it had shown there was a judgment for the payment of monies, which had yet to be satisfied, it was entitled to the issuance of an order to enforce such judgment.

[23] In respect of an application for writ of seizure and sale (WSS) and PO, the procedures and disclosures are governed by O. 45 r. 12 and O. 47 r. 6 of the Rules of Court 2012 (RC 2012). In this instant application, all the prescribed requirements had been complied with.

Submissions Of KAJ

[24] KAJ submitted there had been material non-disclosures which entailed the setting aside of the PO. The setting aside is consistent with O. 2 r. 2 of the RC 2012 where the Rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly. *AIC Ltd v. Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 was cited for this proposition.

[25] Reference was made to *International Finance Trust Co Ltd And Another v. New South Wales Crime Commission (IFTC)* [2009] 261 ALR 220 where a party asking for an injunction *ex parte* is duty bound to bring to the court's notice all facts material to the determination of his right to that injunction and this is not confined to cases where equitable relief is sought.

[26] Next was *Aristocrat Technologies Australia Pty Ltd and Others v. Allam and Others* [2016] 327 ALR 595 that the failure of disclosure is ordinarily sufficient to warrant discharge of *ex parte* orders and this principle is not

confined to particular types of interlocutory orders. Its rationale lies in the importance of the administration of justice to the courts and the public being able to have confidence that an order will not be made in the absence of a person whose rights are affected.

[27] *IFTC* and *Aristocrat* meant that the requirements of O. 47 r. 6 are only enabling in nature and not intended to oust the element of good faith in disclosure, which applies universally.

[28] Added to this is *The Customs and Tax Administration of the Kingdom of Denmark*.

[29] Further, Sinohydro being a secured creditor, cannot seize unencumbered lands belonging to KAJ, as if it is an unsecured creditor.

[30] It was also submitted that as the adjudication decision had been stayed on 3 January 2023, the substratum enabling Sinohydro to proceed with the WSS and PO is gone.

Our Decision

Ex parte Notice Of Application

[31] We begin by perusing the *ex parte* notice of application for execution filed by Sinohydro dated 7 November 2022 (encl. 14/166-167) which sets the premise for its PO. This notice of application for the following orders was filed pursuant to O. 45 r. 12 and O. 47 r. 6 of the RC 2012:

> (a) That a Writ of Seizure and Sale pursuant to Order 45 Rule 12(1) of the Rules of Court 2012 be issued ordering that all the immovable properties specified in the Schedule A herein (hereinafter referred to as "the Properties") and the interest of the Defendant/Execution Debtor, KAJ Development Sdn Bhd, in the Properties be attached and taken in execution to satisfy the Judgment or Order dated 16 April 2021 made by the High Court at Kuala Lumpur in Originating Summons No. WA-24C-250-12/2020;
>
> (b) A Prohibitory Order pursuant to Order 47 Rule 6 of the Rules of Court 2012 and within the meaning of Section 334 of the National Land Code be granted prohibiting the Defendant/Execution Debtor, KAJ Development Sdn Bhd, from transferring, charging or leasing the Properties or any of the Properties or any part of the Properties or any interest in any or any part of the Properties; and for the purpose of this Order "charging" includes the creation of a lien by deposit of a document of title;

[32] The properties in question are the subject land, which is 13 parcels of land. It is not disputed that this subject land is not the secured land of the nine parcels of land.

[33] In para. 11 of the affidavit in support (encl. 14/119), the deponent has affirmed the following:

11. In accordance with and/or for purpose of Order 47 Rule 6(c) of the Rules of Court 2012, I hereby state as follows:

(i) The judgment or order to be enforced is the Judgment/Order dated 16.04.2021 referred to or described in paragraph 4 hereinabove and annexed herewith marked as "ZJY-1";

(ii) The name of the judgment debtor in respect of whose immovable property or interest an order is sought herein is KAJ Development Sdn Bhd;

(iii) The amount remaining unpaid under the Judgment/Order at the time of this application is RM250,209,851.94;

(iv) The immovable properties or the interest therein in respect of which an order is sought herein are as described in paragraph 10 hereinabove and specified in the Schedule attached to the Said Application; and

(v) To the best of my information or belief, the said immovable properties are the Defendant's/Execution Debtor's and the source of my information or the grounds for my belief is the land searches conducted on the said immovable properties annexed herewith marked as "ZJY-3".

Requirements Under O. 47 r. 6 Of The RC 2012

[34] We next refer to the provisions of O. 47 r. 6 and in particular sub-paras. (a) to (c) which provides as follows:

6. Immovable property. (O. 47 r. 6)

Where the property to be seized consists of immovable property or any registered interest therein, the following provisions shall apply:

(a) a seizure shall be made by an order by the court of a Judge prohibiting the judgment debtor from transferring, charging or leasing such property or interest; and for the purpose of this rule "charging" includes the creation of a lien by deposit of a document of title;

(b) an application for an order under this rule may be made *ex parte* by a notice of application;

(c) the application shall be supported by an affidavit:

(i) identifying the judgment or order to be enforced;

(ii) stating the name of the judgment debtor in respect of whose immovable property or interest an order is sought;

(iii) stating the amount remaining unpaid under the judgment or order at the time of application;

(iv) specifying the immovable property or the interest therein in respect of which an order is sought; and

(v) stating that to the best of information of belief of the deponent, the immovable property or interest in question is the judgment debtor's and stating the sources of the deponent's information or the grounds for his belief;

[35] What has been disclosed in para. 11(c) of the affidavit in support is exactly what O. 47 r. 6(c) requires, nothing more and nothing else.

[36] It is also clear that O. 45 of the RC 2012 provides the scheme towards the enforcement of any judgment or order for the payment of money, wherein one of the modes for enforcement is by way of WSS. Order 47 deals specifically with WSS and the procedure for the seizure of immovable property is spelt out in r. 6 as set out above.

[37] Hence, in *Indacon Sdn Bhd v. DMC Development Sdn Bhd* [2019] 1 LNS 1369, the following was said:

> [26] ... A monetary entitlement pursuant to a court judgment is plainly enforceable pursuant to the modes of execution provided in Order 45 of the Rules of Court 2012 which include the entry of a prohibitory order and sale by auction as envisaged and provided in Order 47 rules 6 and 7 of the Rules of Court 2012 respectively. ...

[38] In *Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors* [1991] 1 CLJ 711; [1991] 2 CLJ (Rep) 332; [1991] 2 MLJ 327, the following principle was laid down at p. 339 (CLJ); p. 331 (MLJ):

> Secondly, the detailed requirements to be observed for the seizure of land or an interest therein held by a judgment debtor should be noted; they are contained in O. 47 r. 6. These together with ss. 334-339 of the Code enable the judgment creditor to apply for a prohibitory order to be registered against the land or interest in the land held by a judgment debtor by entry in the Register Document of Title and then to proceed with execution by issue of a writ of seizure and sale to sell the same with a view to satisfying the judgment debt under O. 45 r. 1 and s. 337. ...

[39] Therefore, the seizure of land to enforce the judgment for the payment of money can be through a WSS where the procedure is provided in O. 47 r. 6 and para. (c) in particular, spells out what the *ex parte* application ought to disclose.

[40] The adjudication sum has been obtained through the adjudication decision whereby the HC has on 16 April 2021 allowed its enforcement pursuant to s. 28 of the CIPAA. This means the adjudication decision can be enforced as if it is a judgment of the court. It is not disputed that this money has yet to be paid even as of today. Sinohydro is therefore entitled to enforce the valid adjudication decision where the execution proceedings such as PO are specifically provided in O. 47 particularly r. 6, and in the context of this appeal, more particularly paras. (a) to (c).

[41] We also refer to *Econpile (M) Sdn Bhd v. ASM Development (KL) Sdn Bhd* [2021] 9 CLJ 896 which dealt *inter alia*, with the issue of setting aside a PO. As stated in p. 906:

> [29] ... I am inclined to hold that the DR did not err in her assessment that ASM has not shown sufficient cause to merit an order to set aside the PO. Econpile has obtained the enforcement order, which has not been stayed or set aside up to the date of the hearing before the DR. Mr Rohan had cited ample authorities to support his submission that the enforcement order is binding, valid and enforceable against ASM ... Econpile is thus entitled to avail itself to the machinery of enforcement by way of WSS of the said land as a means of recovering the judgment debt and to obtain the PO so as to maintain the *status quo* pending disposal of the said land by sale in the execution proceedings (see too, *Indacon Sdn Bhd v. DMC Development Sdn Bhd* [2019] 1 LNS 1369; [2019] MLJU 1046). It is only when the total amount of the judgment debt is paid that the judgment ceases to be of any avail (see *United Investment & Finance Ltd v. Universal Service Agency* [1965] 1 LNS 191; [1965] 2 MLJ 235), however, judging by ASM's actions until the date of the hearing of the appeal, it is evident that ASM has no intention of obeying the enforcement order.

[42] What was said to be material non-disclosures in para. 69 (a) to (g) of the HC's GOJ, goes beyond what is required by O. 47 r. 6(c). They are not non-disclosures, let alone material. We find that Sinohydro has indeed fully complied with O. 47 r. 6(c) and disclosed all that was required. The RC 2012 has stated how the execution is to proceed and where the procedure for PO is provided, we will not go behind the PO.

Choice Of Remedies And Enforcement

[43] Further, cl. 23 of the LOA (encl. 11/92) provides as follows:

> 23. Remedies
>
> No remedy conferred by any of the provisions of the Contract is intended to be exclusive of any other remedy conferred in the Contract or which is otherwise available at law, in equity, by statute or otherwise, and each and every other remedy shall be cumulative and shall be in addition to every other remedy given under the Contract or now or hereafter existing at law, in equity, by statue or otherwise. The election of any one or more of such remedies by any of the Parties shall not constitute a waiver by such Party of the right to pursue any other available remedies.

[44] This effectively allows Sinohydro to pursue any remedies available to it and the election of any remedy is not waiver to pursue any other remedy. In para. 67 of the GOJ it was stated as follows:

> [67] Upon obtainment of the Enforcement Order, Sinohydro is not barred from pursuing whatever remedies it has simultaneously or successively or even not all. Nevertheless, when it chose to seek the orders as prayed in

> the *Ex-Parte* Notice of Application, it is incumbent on Sinohydro to make a full and fair disclosure of all the material facts which the DR should know in dealing with the application for the issuance of a WSS and a PO.

[45] The HC had in fact recognised Sinohydro was not barred from pursuing whatever remedies it has, but fell into error by requiring full and fair disclosure outside the confines of O. 47 r. 6(c).

[46] The pursuit of remedies and the principle that a judgment creditor as is Sinohydro, has been neatly captured in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77. At p. 56 (CLJ); p. 93 (MLJ), this was said:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v. Tan* (1989) 3 All ER 839 at p 842.

Conclusion On Disclosure

[47] To conclude on this issue, the material facts to be set out under O. 47 r. 6(c) of the RC 2012 have been disclosed. These pertain to the enforcement order; KAJ being the judgment debtor, the unpaid amount under the adjudication decision and enforcement order; the subject land; and the information that the subject land is KAJ's. The facts said to be material non-disclosure, to name but a few, such as Sinohydro being a secured creditor, the value of secured land not being what it seems, and the project being a national project, are not what O. 47 r. 6(c) requires to be disclosed.

Requirement Of Disclosure And Good Faith

[48] We now deal with the authorities cited by KAJ on the need for material disclosure and the attendant consequence and what it called the good faith in disclosure.

[49] We certainly do not disagree with *The Customs and Tax Administration of the Kingdom of Denmark*, in particular paras. 57 to 59 which held that there is a duty to make full and fair disclosure in *ex parte* applications and such material non-disclosure may lead to the discharge of the *ex parte* order. However, this onerous and compelling duty was in the light of *Mareva* injunctions where it is long recognised that material non-disclosure will certainly result in an *ex parte* order being set aside.

[50] Likewise, we do not disagree with the need to deal with cases justly as stated in *AIC Ltd*, except that our case deals with the enforcement of an order with prescribed procedure as per O. 47 r. 6 of the RC 2012.

[51] *IFTC* at p. 256 essentially stated that a party asking for an injunction *ex parte* is duty bound to bring to the court's notice all facts material to the determination of his right to that injunction. At p. 257, it was further stated:

> [132] The decision in Edison can be understood as a particular application of the equitable maxim that a party who seeks equity must do equity. But the obligation to make proper disclosure when seeking relief from a court without notice to the opposite party should not be understood as confined to cases where equitable relief is sought.

[52] Although *IFTC* suggests that disclosure is not necessarily confined to equitable relief, that case itself dealt with an *ex parte* restraining order under the New South Wales Criminal Assets Recovery Act 1990.

[53] With regard to *Aristocra*t, reliance was placed in particular on para. 15 at pp. 599 to 600 as follows:

> [15] It is an elementary principle of our ordinarily adversarial system of justice that full and fair disclosure must be made by any person who seeks an order from a court *ex parte*, with the result that failure to make such disclosure is ordinarily sufficient to warrant discharge of such order as might be made. The principle is not confined to particular types of interlocutory orders. Its rationale lies in the importance to the administration of justice of the courts and the public being able to have confidence that an order will not be made in the absence of a person whose rights are immediately to be affected by that order unless the court making the order has first been informed by the applicant of all facts known to the applicant which that absent person could be expected to have sought to place before the court had the application for the order been contested.

[54] The submission of KAJ was that this related to the levy of property and what is required to be stated in the application is similar to our WSS. It is said this is evident from r. 39.3 of the Uniform Civil Procedure Rules 2005 (encl. 49/239-240).

[55] Sinohydro, in turn stated with reference to para. 5 of the case that the issue there was the non-compliance of r. 39.3(c) relating to certificate of taxation of costs.

[56] To better appreciate the arguments, we need to refer to r. 39.3 which provides as follows:

> 39.3 Affidavit in support of application for writ of execution
>
> ...

(4) In the case of a writ for the levy of property, the affidavit in support: A

(a) must state the amount payable under the judgment, together with any costs and interest payable in relation to the judgment, as at the date of swearing of the affidavit, and

(b) must state the address or addresses at which property belonging to the judgment debtor may be located, and B

(c) if the judgment was entered as a result of the filing of a cost assessor's certificate, must include a statement to that effect, together with a statement to the effect that the determination set out in the certificate: C

(i) is not subject to any suspension under section 86 of the Legal Profession Uniform Law Application Act 2014 that has not been ended under that section,

and

(ii) is not subject to any suspension under section 90 of the Legal Profession Uniform Law Application Act 2014 that has not been ended under that section. D

[57] Looking at the context of *Aristocrat*, it was specifically provided in r. 39.3(c) the requirement to state the cost assessor's certificate in certain circumstances and there was no such compliance. This differs from our situation where Sinohydro had stated in its affidavit in support of all that was required of it. We are not required to import a disclosure where none exists. E

[58] In short, we look only to O. 47 r. 6 to say there has been a disclosure of what was required to be disclosed. The cases relied on by KAJ do not assist in any way. F

Enlarging Remedies As A Secured Creditor

[59] With regard to Sinohydro enlarging its remedies as a secured creditor to include the remedies of an unsecured creditor, we find there is no merit to that contention. There has been no authority to the effect that a secured creditor cannot proceed with execution proceedings to recover a judgment debt or that Sinohyrdo's remedies are limited to realising the security it holds. In fact, O. 45 r. 1 does not make a distinction as to the type of creditor where modes of enforcement are concerned. It reads: G

1. Enforcement of judgment or order for payment of money. (O. 45 r. 1) H

(1) Subject to the provisions of these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into court, may be enforced by one or more of the following means:

(a) a writ of seizure and sale; I

A (b) garnishee proceedings;

(c) in a case in which rule 5 applies, an order of committal.

[60] As was stated earlier, Sinohydro is entitled to enforce its judgment as long as it is in accordance with the mode and procedure in O. 45 and specifically in O. 47 r. 6.

B

Stay Order

[61] On the effect of the stay, it has been stated in paras. 63 and 64 of the GOJ as follows:

C [63] With regards to the 1st ground of appeal, the court agrees with Sinohydro's submission that the effect of the Order made by this court on 3 January 2023 is to stay the execution of the Enforcement Order. This means that the execution of the Order made by this court on 16.4.2021 under s 28 CIPAA to enforce the AD is temporarily stayed until the hearing and disposal of KAJ's appeal against the decision of this court.

D [64] It is very clear to this court that the decision on 3 January 2023 is not a stay of the AD. The substratum of the *Ex-Parte* Order made by the DR on 11 November 2022 is thus very much alive.

[62] This shows that there is no stay of the adjudication decision but only a stay of the execution of the enforcement order. The HC made it clear in no uncertain terms that the substratum of the PO is very much alive. This thus puts paid to KAJ's contention that the substratum to enable the application under O.47 is gone such that the PO cannot be maintained.

E

Conclusion

F **[63]** For the above reasons, we are compelled to allow the appeal. We set aside the HC order dated 10 March 2023 and restore the order of the DR dated 20 January 2023. We award costs of RM15,000 to Sinohydro, subject to allocator.

G

H

I